SUPREME COURT OF THE UNITED STATES.

No. 387.

IRA G. FRENCH, PLAINTIFF IN ERROR,

VS.

THOMAS EDWARDS, W. T. CAROTHERS, J. T. CAROTHERS, SAMUEL ONESTI, ANTONIO DESILVA, DAVID MOREE, SAMUEL O. NESS, LEONARD HOYT, JEFFERSON LAKE, W. W. CROUSE, L. W. LINCOLN, ANDREW CAROTHERS, AND R. SHERBURN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

		Original.	Print.
Answer, separate, of	Caruthers, W. T. and J. F.	16	8
	Caruthers, Andrew	21	10
	Crouse, W. W.	25	12
	De Silva, Antonio	20	10
	Edwards, Thomas	17	9
	Hoyt, Leonard	32	14
	Lincoln, L. M.	23	11
	Lake, J.	36	16
	Morell, David; S. Oness, and Antonio De Silva	20	10
	Oness, Samuel, and Morell, David, and A. De Silva	20	10
	Onesti, Samuel	7	5
	Silver, Antonio	11	6
	Sherburn, R.	29	13
	Tildon, W.	15	8
Answer, supplemental		40	17
Bond on writ of error		62	25
Complaint		1	2
order amending		43	18
Clerk's certificate		65	26
Exceptions, bill of		60	25
Finding		45	19
Jury, stipulation waiving		39	17
Judgment		58	24
Summons		4	3
Writ of error		a	1
Citation		c	1

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Ira G. French, plaintiff in error, and Thomas Edwards, W. T. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. W. Lincoln, Andrew Carothers, and R. Sherburn, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-7th.

[SEAL.] L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Dis't of Cal.,
By J. F. O'BEIRNE, *Dep. Cl'k.*

b The answer of the judges of the circuit court of the United States for the district of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to the writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER,
Clerk of U. S. Circuit Court, Dis't of Cal.,
By J. F. O'BEIRNE, *Dep. Cl'k.*

(Indorsed:) United States Supreme Court. Ira G. French, pl'ff in error, vs. Thomas Edwards & al., def'ts in error. Writ of error. Filed 30th Nov., 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

c UNITED STATES OF AMERICA, *ss:*

To Thomas Edwards, W. P. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Morel, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. W. Lincoln, Andrew Carothers, and R. Sherburn, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held in the city of Washington, District of *California*, on the first Monday of January, A. D. 1873, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States of the ninth judicial circuit in and for the district of California, wherein Ira G. French is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the United States Supreme Court, this 30th day of November, A. D. 1872, and of the Independence of the United States the 97th.

[SEAL.] OGDEN HOFFMAN,
Judge of the District Court of the U. S. for the District of California.

We admit sirvice of a copy of the within and foregoing citation this 30th day of November, A. D. 1872.

LAKE & WILLIAMS,
At'ys for Defendants in Error.

(Indorsed:) United States Supreme Court. Ira G. French, pl'ff in error, vs. Thomas Edwards & al. Citation. Filed Nov. 30th, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

1 *Complaint.*

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF, *vs.* THOMAS EDWARDS, L. LINCOLN, L. HOYT, W. W. Crouse, Huntoon, Crowell, Mrs. Buckmaster, Mrs. S. Hall, Mrs. E. Lake, E. Paine, A. Carothers, T. Carothers, W'm Carothers, D. E. Hastings, R. Sherburn, F. Davis, W. Tildon, H. B. Gales, Cook, J. Lake, F. Windrick, Antone , Joseph , David Morel, John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe, defendants.	November 8th, 1866. Complaint in ejectment.

The plaintiff, Ira G. French, a citizen and resident of the State of New York, by S. F. and J. Reynolds, attorneys, complains of the above-named defendants, all citizens of the State of California aforesaid, and for cause of action avers that, on the first day of March, 1862, he, the said plaintiff, was the owner in fee-simple, and was seized in his 2 own right in fee-simple absolute, and was then and still is, as such owner, entitled to the possession of the following-described tract and parcel of land, situated in the town of Sutter, county of Sacramento, and State of California, bounded on the north, east, and south by lands formerly granted by the Mexican government to one John A. Sutter, and on the west by the Sacramento River, commencing at the corner of Main and Water streets, of the said town of Sutter, at the east bank of said Sacramento River; running thence in a northerly direction up and along said river one-half of a mile, and thence in an easterly direction one mile, thence southerly, at right angles, one-half mile, and thence westerly, at right angles, one mile to the place of beginning, being one-half of the original surveyed town of Sutterville, formerly so called, now called Sutter, and being the same tract of land conveyed by said John A. Sutter to one L. W. Hastings, on the 30th of November, 1849, said premises being a part of the land granted to the said John A. Sutter, under the name of "New Helvetia," and containing 320 acres.

And the plaintiff further says that, being so seized of the said premises as aforesaid, the said defendants afterwards, to wit, on the said first day of March, 1862, unlawfully entered into and upon said premises, and they have ever since, and do now, unlawfully withhold from the plaintiff the possession thereof, to his damage twenty thousand dollars.

3 And the plaintiff further says that he is a citizen of the State of New York, and resides in said State; and that the defendants are all citizens of the State of California.

The plaintiff further says that the Christian names of Huntoon, Crowell, Cook, and Mrs. Buckmaster are unknown to him, as also the full names of the defendants Antone , and Joseph ; and that the names John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe, are ficticious names, representing defendants whose real names are unknown to the plaintiff, and the plaintiff prays that the real and full names of all the defendants may be inserted when ascertained.

And the plaintiff further says that the value of the use and occupation of said premises since said first day of March, 1862, is the sum of twenty thousand dollars.

Wherefore said plaintiff prays that he may recover possession of said lands, and have judgment for the restitution of said land and premises; and that he may recover the sum of twenty thousand dollars as damages for withholding the same from him as aforesaid, and for the rents and profits thereof, besides costs.

S. F. & J. REYNOLDS,
Attorneys for Plaintiff.

(Endorsed:) Filed November 8, 1860. Geo. C. Gorham, clerk, by L Neall, d. c.

4 *Summons.*

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF,
vs.
THOMAS EDWARDS ET AL., DEFENDANTS.

Action brought in the said circuit court and the complaint filed in the city and county of San Francisco, in the office of the clerk of said court.

The President of the United States of America, greeting:
To Thomas Edwards, L. Lincoln, L. Hoyt, W. W. Crouse, Huntoon, Crowell, Mrs. Buckmaster, Mrs. S. Hall, Mrs. E. Lake, E. Paine, A. Carothers, T. Carothers, W'm Carothers, D. E. Hastings, R. Sher-

burn, F. Davis, W. Tildon, H. B. Gales,   Cook, J. Lake, F. Windrick, Antone   , Joseph   , David Morell, John Doe, Richard Roe, James Jackson, Peter White, John Brown, John Smith, and John Roe.

You are hereby required to appear in an action brought against you by
the above-named plaintiff in the circuit court of the United States for
the northern district of California, and to file your plea, answer, or de-
murrer to the complaint filed herein (a copy of which accompanies this
summons) in the office of the clerk of said court in the city and
5 county of San Francisco, within ten days (exclusive of Sundays
and day of service) after the service on you of this summons, if
served in this county, or, if served out of this county, then within forty
days, or judgment by default will be taken against you.

The said action is brought to recover possession of 320 acres of land, in the town of Sutter, county of Sacramento, and State of California, part of land granted to John A. Sutter by the name of "New Helvetia,' and $20,000 damages for withholding the same, and for rents and profits, besides costs, and if you fail to appear and plead, answer, or demur as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 8th day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of our Independence the 91st.

[SEAL.] Attest: GEO. C. GORHAM, *Clerk*,
By S. NEALL, *D. C.*

[50 c. U. S. s.]

U. S. MARSHAL'S OFFICE,
District of California:

I hereby certify that on the 10th day of November, A. D. 1866, I re-
ceived the within summons, and on the 13th day of November,
6 A. D. 1866, personally served the same by delivering to W. W.
Crouse, Jefferson Lake, Frank Davis, Edward Payne, Frank
Hoyt, J. W. Tilden as Mr. Tilden, L. Lincoln, Antone Reiff as Antone,
J. Crowell as Crowell, Cha's Devato as John Doe, O. Bostine as D. Mo-
rell, W. Cathothers, D. E. Hastings, R. Sherborne, Mrs. E. Lake, Mrs.
Buckmaster, John A. Cook as Cook, Thomas Edwards, Thomas Caroth-
ers, Mrs. Sarah Hall, H. B. Gales,   Huntoon, Frederick Chepere
Piere as Richard Roe, John Onasta as James Jackson, Austin Alta as
John Brown, Samuel Aness as John Smith, and A. Cathrothers, said
defendants personally, in the county of Sacramento, a copy of said sum-
mons attached to a certified copy of the complaint.

CHARLES W. RAND,
U. S. Marshal.
By A. C. TAYLOR, *Deputy.*

SAN FRANCISCO, *March* 2, 1867.

7 *Separate answer of Samuel Onesti.*

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF,
vs.
SAMUEL ONESTI, (WHO IS SUED BY THE NAME of James Jackson,) interpleaded with Thomas Edwards, L. Lincoln, and others.

Now comes the said defendant, Samuel Onesti, (who is sued by the name of James Jackson,) and for his separate answer to the complaint of the said plaintiff filed in said cause, answers as follows, to wit:

He denies each and every allegation in the said complaint contained.

And for a further and other answer to said complaint, this defendant denies that the said Ira G. French is a citizen or resident of the State of New York, or was a citizen or resident of the State of New York at the time of the commencement of this suit. And he denies that said defendants are all citizens of the State of California, or were all citizens of the State of California at the time of the commencement of this suit; this defendant denies that he is a citizen of the State of California.

8 He denies that on the first day of March, 1862, (or ever at any time,) he, the said plaintiff, was the owner in fee-simple, (or the owner in any manner or degree whatever,) or that he was seized in his own right (or in the right of any person) in fee-simple absolute, or in any manner or degree whatever, or was then or still is as such (supposed) owner entitled to the possession of the lands described in said complaint or any part of said lands.

And this defendant denies that he, the said defendants, or either of them, afterwards, to wit, on the said first day of March, 1862, (or ever at any time,) unlawfully (or otherwise) entered into or upon said premises, (or any part thereof,) or have ever since (or at any time) or do now unlawfully (or otherwise) withhold from the plaintiff the possession thereof (or any part of the same) to his (the plaintiff's) damage twenty thousand dollars, (or any sum whatever.)

And this defendant denies that the value of the use or occupation (or use and occupation) of said premises since said first day of March, 1862, (or since any other date,) is the sum of twenty thousand dollars, (or any other sum whatever.)

And for a further and separate answer to the complaint, this defendant says that the said plaintiff ought not whatever, maintain his aforesaid action thoreof against him, this defendant, because he says that neither the said plaintiff, his ancestors, predecessors in interest, nor grantors, was or were seized or possessed of the lands and premises
described in said complaint (or any part of said lands or
9 premises) within five years next immediately preceding the com-
mencement of this suit, and this he is ready to verify; wherefore,
he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

And for a further and other answer to said complaint, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant, because he says that neither the plaintiff, his ancestors, predecessors in interest, nor grantors, was or were seized or possessed of the lands or premises described in said complaint, (or any part of said lands or premises,) within two years next immediately before the commencement of this suit, and this he, this defendant, is ready to verify; wherefore, he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

And for a further and separate answer to that part of said complaint which claims damages for the detention of said land prior to the 8th day of November, A. D. 1864, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant for the supposed damage last above described, because he says that the same did not, nor did any part thereof, accrue within two years next immediately before the commencement of this suit, and this he, this defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid 10 action thereof against this defendant for the said supposed damages last aforesaid; wherefore this defendant prays for a separate order and judgment, and to be hence dismissed with his costs.

JAMES McCABE,
Attorney for Defendant Floire Onesti.

(Endorsed:) Filed December 12th, 1866. Geo. C. Gorham, clerk, by Dan'l F. Sullivan, deputy.

11 *Separate answer of Antone Silver.*

In the circuit court of the United States in and for the northern district of California.

IRA G. FRENCH, PLAINTIFF,
vs.
ANTONE SILVER, (WHO IS SUED BY THE NAME of Antone , impleaded with Thomas Edwards, L. Lincoln, & others, def't'.

Now comes the said defendant, Antone Silver, (who is sued by the name of Antone ,) and for his separate answer to the complaint of the said plaintiff in this cause, filed answers as follows, to wit:

He denies each and every allegation in the said complaint contained.

And for a further and other answer to said complaint this defendant denies that said Ira G. French is a citizen or resident of the State of New York, or was a citizen or resident of the State of New York at the time of the commencement of this suit; and he denies that s'd defendants are all citizens of the State of Calfornia, or were citizens of said State at the time of the commencement of this suit. This defendant denies that he is a citizen of the State of California. He denies that on the 1st day of March, 1862, (or ever at any time,) he, the said plaintiff, was the owner in fee-simple, or the owner in any manner 12 or degree whatever, or that he was seized in fee in his own right, (or in the right of any person,) in fee-simple absolute, (or in any manner or degree whatever,) or was then, or still is, as such (supposed) owner, entitled to the possession of the lands described in said complaint, or any part of said lands.

And this defendant denies that the said defendants, or either, or any of them, afterwards, to wit, on the said first day of March, 1862, (or ever at any time,) unlawfully (or otherwise) entered into or upon said premises, (or any part thereof,) or have ever since, (or at any time,) or do now, unlawfully (or otherwise) withheld from the plaintiff the possession thereof, (or of any part of the same,) to his (the plaintiff's) damages twenty thousand dollars, (or any sum whatever.)

And this defendant denies that the value of the use or occupation of said premises since said first day of March, 1862, (or since any other date,) is the sum of twenty thousand dollars, (or any other sum whatever.)

And for a further and separate answer to said complaint this defendant says, that a certain part of the property described in said complaint
this defendant claims the right of possession as tenant to one John
Bells, which said part of said property is claimed by this defendant, is
designated and know nas follows, to wit: a piece of land formerly known
as the Stewart lot, situated in said town of Sutter, containing ten acres
and $\frac{56}{100}$. Also, that a certain other part of said property de-
13 scribed in said complaint this def't claims the right of posses-
sion of as tenant to one Richard Sherburn, which said part of
said property so claimed by this defendant as last aforesaid, as tenant
to said Sherburn, is described as being in the town of Sutter, and abutting on the lands of D. E. Hastings, which lies upon the south of the said piece of land on which this defendant is entitled as aforesaid, and bounded on the north by lands claimed by J. Lake, containing about eight acres.

That the said John Bells is the owner in fee-simple absolute of the piece of said land first above described, and the said Richard Sherburn is the owner in fee-simple absolute of the said piece of land last above described.

And for a further and other answer to said complaint, this defendant says that said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant, because he says that neither the said plaintiff, his ancestors, predecessors in interest, nor grantors, was, or were seized or possessed of the land or premises described in said complaint (or any part of said land and premises) within five years next immediately before the commencement of this suit, and this he is ready to verify; wherefore he prays judgment if the plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

And for a further and other answer to said complaint, this defendant says that the said plaintiff ought not to have or maintain his afore-
said action thereof against this defendant, because, he says,
14 that neither the said plaintiff, his ancestors, predecessors in in-
terest, nor grantors, was or were seized or possessed of the lands
or premises described in said complaint (or any part of said lands and premises) within two years next immediately before the commencement of this suit, and this he, this defendant, is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant.

And for a further and other answer to that part of said complaint which claims damages for the detention of said land prior to the 8th day of November, A. D. 1864, this defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against this defendant for the supposed damage above last described, because he says that the same did not, nor did any part thereof, accrue within two years next immediately before the commencement of this suit, and this he, this defendant, is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against this defendant for the said supposed damages last aforesaid.

Wherefore this defendant prays for a separate verdict and judgment, and to be hence dismissed, with his costs.

JAMES McCABE,
Attorney for Def't Antone Silvar.

(Endorsed:) Filed Dec. 12, 1866. Geo. C. Gorham, cl'k, by Daniel T. Sullivan, D. C.

15 *Answer of W. Tildon.*

In the circuit court of the United States of America in and for the northern district of the State of California.

IRA G. FRENCH
vs.
EDWARDS ET AL.

Now comes the said Tildon, one of the above-named defendants, and for answer to the plaintiff's complaint herein, denies generally and specifically each and every allegation contained in said complaint.

Wherefore, having fully answered, said defendant, Tildon, prays to go hence, with his costs of suit.

HENRY H. HARTLEY,
Attorney for said Defendant Tildon.

(Endorsed:) We admit due service of a copy of the within answer this March 7th, 1867.

S. F. & J. REYNOLDS,
Pl't's Attorney.

Filed March 7th, 1867. Geo. C. Gorham, clerk, per Jno. O. Wheeler, dep.

16 *Separate answer of W. F. and J. F. Carothers.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
W. T. CORUTHER AND J. T. COMATHER, impleaded with Thomas Edwards et al.

W. T. Coruthers and J. F. Coruthers, def'ts in the above-entitled action, impleaded with Thomas Edwards and the other defendants, come by their attorney, Thompson Campbell, and for their separate answer to the complaint in the above-entitled action, say that they are not guilty of the trespass and ejectment mentioned in the plaintiff's complaint.

Wherefore they pray judgment of said plaintiff, and for their costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendants.

(Endorsed:) Filed March 16th, 1867. Geo. C. Gorham, clerk, per Wheeler, dep.

17 *Separate answer of Thomas Edwards.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
THOMAS EDWARDS ET AL., IMPLEADED WITH
Jefferson Lake et al.

Thomas Edwards, one of the defendants in the above-entitled cause, impleaded with Jefferson Lake and the other defendants, comes, by his attorney, Thompson Campbell, and, for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

And, for a further and separate defence, says that at the time of the suing out of this writ in this action, and before that time, to wit, on the first day of March, 1862, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following-described parcels or lots of ground, being a part of the premises described in plaintiff's complaint, and which are bounded and described as follows: Lot No. 10 on the map and plan of the town of Sutter, drawn by C. W. Coote, July 1st, 1850, being a certain original lot of 80 by 160 feet, and he avers that he does not occupy any other

18 part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that at the time of the commencement of this action, he was holding the premises so described and occupied by him as aforesaid, under color of title in good faith and adversely to the claims of the said plaintiff, and that while holding said premises he made permanent and valuable improvements on the same, to wit, of the value of five hundred dollars, which said amount this defendant claims to recover by way of counterclaim of the said plaintiff's demand to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

For a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that, during the time he so held and occupied said premises, he paid delinquent taxes that were levied on said premises and on the improvements thereon to the amount of one hundred dollars, which last-mentioned amount, together with interest thereon at the rate of five per cent. per month from the date of the payment of such taxes until the commencement of this action, this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

19 The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so possessed and occupied by the said defendant as aforesaid prior to the 14th day of November, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And for a further and separate defence, the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors, was possessed or seized of that portion of the premises described in the complaint as occupied and possessed by the said defendant as hereinbefore particularly described and set forth within five years before the commencement of this action.

Wherefore the said defendant prays judgment against the said plaintiff and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

(Endorsed:)

Service admitted.

REYNOLDS.

Filed March 16th, 1867. Geo. C. Gorham, clerk, per Wheeler, dep.

20 *Separate answer of Antonio de Silva, David Morell, and Samuel Oness.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
ANTONIO DE SELVA, DAVID MORELL, AND Samuel O. Ness, impleaded with Thomas Edwards et als.

Antonio de Silva, David Morell, and Samuel O. Ness, defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, come, by their attorney, Thompson Campbell, and for their separate answer to the complaint in the above-entitled action, say that they are not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

Wherefore the said defendants pray judgment against the said plaintiff and for their costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendants.

(Endorsed:)

Service admitted. REYNOLDS.

Filed March 16, 1867. Geo. C. Gorham, clerk, per Wheeler, dep'y.

21 *Separate answer of Andrew Caruthers.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
ANDREW CARUTHERS, IMPLEADED WITH Thomas Edwards et al.

Andrew Caruthers, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, come, by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And for a further and separate defence the said defendant says that, at the time of the suing out the writ in this action, and before that time, to wit, on the 12th day of May, 1866, the defendant was and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following-described parcel or lot of ground, being a part of the premises described in plaintiff's complaint; said tract being particularly located and described on a certain plat, made on the 9th day of March, 1867, of the tract of land known as the Hastings or Vance tract, by A. G. Wilson; the said tract being marked on
22 said plot, (A. Caruthers,) and containing about 13 acres, more or less. And he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

Wherefore the said defendant prays judgment of the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

(Endorsed:)

Service admitted.

REYNOLDS.

Filed March 16th, 1867. Geo. C. Gorham, clerk, by Wheeler, dep.

23 ***Separate answer of L. M. Lincoln.***

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
L. M. LINCOLN, IMPLEADED WITH THOMAS EDWARDS et al.

L. M. Lincoln, one of the defendants in the above-entitled cause, impleaded with Thomas Edwards and the other defendants, comes, by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that, at the time of the commencement of this action, he was holding the premises under color of title adversely to the claims of the said plaintiff in good faith, and that while so holding he made permanent and valuable improvements on said premises so held and occupied by him, as aforesaid, of the value of two hundred dollars, which amount this defendant claims to recoup by way of counter-claim of the said plaintiff's demand, to the extent that may be proved against him on
24 the trial of this action, and asks judgment the plaintiff for the excess.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises, in the said complaint mentioned, prior to the 14th day of November, 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar

of the plaintiff's right to recover damages against the said defendant.

Wherefore the said defendant prays judgment against the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

(Endorsed:)

Service admitted.

REYNOLDS.

Filed March 16, 1867. Geo. C. Gorham, clerk, p. Wheeler, dep.

25 *Separate answer of W. W. Crouse.*

United States, in and for the district of California.

IRA G. FRENCH
vs.
W. W. CROUSE, IMPLEADED WITH THOMAS EDwards et al.

W. W. Crouse, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, comes by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And for a further and separate defense the said defendant says that, at the time of the suing out of the writ in this action, and before that time, to wit, on the 1st day of March, 1862, he was, and ever since has been, and now is, seized as owner in fee, and entitled to the possession of the following-described parcels or lots of land, being part of the premises described in plaintiff's complaint, and which is bounded and described as follows:

Bounded on the north by the road leading from Sutterville to the Georgiana Slough road and lands of Fred Windrick; on the east 26 by lands of the said Wendrick and the east line of land described in plaintiff's complaint; on the south by the Government line, and lands of Leonard Hoyt; and on the west by a fence; said block containing in all about sixty acres; also another tract of land about two acres, situate lying, and being on the bank of the Sacramento River, on which is a blacksmith-shop and other buildings; and he avers that he does not occupy any other part or parcel of the premiees described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the use and occupation of said premises, the s'd defendant alleges that at the time of the commencement of this action, he was holding the premises so described and occupied by him as aforesaid under color of title in good faith, and adversely to the claims of the said plaintiff, and that while so holding said premises as af'd he made permanent and valuable improvements thereon of great value, to wit, of the value of one thousand dollars, which said amount this def't claims to recoup by way of counterclaim to the plaintiff's demand to the extent that may be proved against him on the trial of this action, and asks for judgment against the plaintiff for the excess.

And for a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time 27 he so held and occupied said premises he paid delinquent taxes that were levied on said premises and on the improvements to the amount of two hundred dollars, which last-mentioned amount, together with interest thereon at five per cent. per month from the date of the payment of such taxes until the commencement of this action, this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff ought not to recover any sum as damages for the use and occupation of the premises so occupied by the said defendant as aforesaid prior to the 1st day of March, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

And for a further and separate defence the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors, were possessed or seized of that portion of the premises described in said plaintiff's complaint as occupied and possessed by the said defendant as hereinbefore particularly described and set forth, within five years before the commencement of this action.

Wherefore the said defendant prays judgment against the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

MARCH 16, 1867.

28 Service is admitted.
March 16, 1867.

REYNOLDS.

Filed March 16, 1867. Geo. C. Gorham, clerk, p. Wheeler, dep.

29 *Separate answer of R. Sherburn.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
R. SHERBURN, IMPLEADED WITH THOMAS EDWARDS et als.

R. Sherburn, one of the defendants in the above-entitled cause, impleaded with Thomas Edwards and the other defendants, comes by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And for a further and separate defence says that, at the time of the suing out of this writ in the action, and before that time, to wit, on the 1st day of March, 1862, the defendant was, and ever since has been, and now is, seized as owner in fee and entitled to the possession of the following-described parcels or lot ground, being a part of the premises described in plaintiff's complaint, and which is bounded and described as follows: Bounded on the north by lands of

Lincoln and Lake; on the east by a fence; on the south by D. Hastings
land; and on the west by the Sacramento River, containing in all
30 about twenty-two acres; and he avers that he does not occupy
any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied as aforesaid, under color of title in good faith adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and valuable improvements thereon, to wit, of the value of two thousand dollars, which said amount this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action, and he asks judgment against the plaintiff for the excess.

And for a further counter to the plaintiff's cause of action for damages the said defendant alleges that during the time he so held and occupied said premises so claimed by the plaintiff in his said complaint, he paid delinquent taxes that were levied on said premises and on the improvements thereon to the amount of five hundred dollars, which last-mentioned amount, together with interest at the rate of five per cent. per
month thereon, from the date of the payment of such taxes until of
this action, this defendant claims shall be deducted from the
31 amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the said premises so possessed and occupied by the said as aforesaid, prior to the 11th day of Nov'r, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said plaintiff plead in bar of the plaintiff's right to recover damages against the said defendant.

And for a further and separate defense, the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors, were possessed or seized of that portion of the premises described in the complaint as occupied and possessed by the said defendant, as hereinbefore particularly set forth, within five years before the commencement of this action.

Wherefore the said defendant prays judgment against the said plaintiff and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

(Endorsed:) Service admitted.

REYNOLDS.

Filed March 16, 1867. Geo. C. Gorham, clerk, p. Wheeler, dep.

32 *Separate answer of L. Hoyt.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
LEONARD HOYT, IMPLEADED WITH JEFFERSON Lake et al.

Leonard Hoyt, one of the defendants in the above-entitled action, impleaded with Jefferson Lake and the other defendants, comes by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint.

And for a further and separate defense the said defendant says that at the time of the suing out of the writ in this action and before that time, to wit, on the first day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized as owner in fee, and entitled to the possession *to* the following-described parcel or lot of ground, being a part of the premises described in plaintiff's complaint, and which is bounded and described as follows: Bounded on the north by a ditch-fence and by land claimed by S. P. Carr and others; on the east by land owned and occupied by Stewart and Lowe; on the
33 south by a ditch-fence and by land of B. C. St. John, and one Tolls, and on the west by the Sutter Lake, containing about sixty acres more or less, and he avers that he does not occupy any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the use and occupation of said premises, the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied by him as aforesaid under color of title in good faith and adversely to the claims of the said plaintiff, and that while so holding said premises he made permanent and valuable improvements on the same, of great value, of one thousand dollars, which said amount this defendant claims to recoup by way of counter-claim to the said plaintiff's demand to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

And for a further counter-claim to the plaintiff's alleged cause of action for damages the said defendant alleges that during the time he so held and occupied said premises he paid delinquent taxes that had been levied on said premises, and on the improvements thereon, to the amount of two hundred dollars, which last-mentioned amount, together with interest thereon at the rate of five per cent. per month from
34 the date of the payment of such taxes until the commencement of this action, this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so occupied by the said defendant as aforesaid, prior to the 14th day of November, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said def't plead in bar of the plaintiff's right to recover damages against the said defendant.

And for a further and separate defense the defendant avers that neither the plaintiff, his ancestors, predecessors, or grantors, were possessed or seized of that portion of the premises described in the complaint as occupied and possessed by the said defendant as hereinbefore particularly described and set forth, within five years before the commencement of this action.

Wherefore the said defendant prays judgment of the said plaintiff, and for his costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

(Endorsed:)
Service admitted.

REYNOLDS.

35 Filed March 16, 1867. Geo. C. Gorham, clerk, p. Wheeler, dep.

36 *Separate answer of J. Lake.*

In the circuit court of the United States in and for the district of California.

IRA G. FRENCH
vs.
J. LAKE, IMPLEADED WITH THOMAS EDWARDS
et als.

J. Lake, one of the defendants in the above-entitled action, impleaded with Thomas Edwards and the other defendants, comes by his attorney, Thompson Campbell, and for his separate answer to the complaint in the above-entitled action, says that he is not guilty of the trespass and ejectment mentioned in plaintiff's complaint, and he denies each and every allegation of said complaint.

And for a further and separate defense says that at the time of the suing out of the writ in this action, and before that time, to wit, on the 1st day of March, A. D. 1862, the defendant was, and ever since has been, and now is, seized as owner in fee, and entitled to the possession of about 149 acres of the premises described in the said plaintiff's complaint, and the part occupied and possessed by said defendant is bounded and described as follows:

Beginning on Burr's southwest corner, thence west 165 rods to a stake on the west margin of Tule Lake; thence back to first station; thence north with Burr's western boundary-line 58 rods to his
37 northwest corner, from which a large, lone white-oak tree bears N. 81° 15′ west, and a large stump of an oak-tree which bears S. 84°; thence continuing same course 175 rods to a stake at Lathrop's west boundary; thence west 115 rods to a stake in the tule of a lake to the place of beginning, containing one hundred and forty-nine acres of land.

Also the following-described lots of land in the town of Sutter, and known as lots numbered eleven and twelve on block 173, and he avers that he does not occupy or possess any other part or parcel of the premises described in said plaintiff's complaint.

For a counter-claim to the alleged cause of action for damages for the value and occupation of said premises the said defendant alleges that at the time of the commencement of this action he was holding the premises so described and occupied by him as aforesaid, under color of title in good faith and adversely to the claims of said plaintiff, and that while so holding said premises he made permanent and valuble improvements on the same of the value of five hundred dollars, which said sum this defendant claims to recoup by way of counter-claim of the said plaintiff's demand to the extent that may be proved against him on the trial of this action, and asks judgment against the plaintiff for the excess.

38 For a further counter-claim to the plaintiff's alleged cause of action for damages, the said defendant alleges that during the time he has held and occupied said premises he has paid delinquent taxes that were levied on said premises and on the improvements thereon to the amount of one hundred dollars in gold coin of the United States, which last-mentioned amount, together with interest thereon at the rate of five per cent. per month from the date of the payment of such taxes until the commencement of this action, this defendant claims shall be deducted from the amount that may be proved against him on the trial of this action.

The said defendant, further answering, says that the plaintiff's right to recover any sum as damages for the use and occupation of the premises so possessed and occupied by the said defendant as aforesaid, prior to the 1st day of March, A. D. 1863, is barred by the statute of limitations of the said State of California, and which statute is by the said defendant plead in bar of the plaintiff's right to recover damages against the said defendant.

Wherefore the said defendant prays judgment against the said plaintiff and for the costs of suit.

THOMPSON CAMPBELL,
Attorney for Defendant.

Services admitted.

REYNOLDS.

(Endorsed:) Filed March 16, '67. Geo. B. Gorham, clerk, p. Wheeler, dep.

39 *Stipulation waiving jury.*

U. S circuit court.

IRA G. FRENCH
v.
THOMAS EDWARDS ET AL.

It is hereby stipulated and agreed that a trial by jury in this action may be, and hereby is, waived.

Dated Sept. 2d, 1872.

DELOS LAKE,
Att'y for Defendants.
JOHN REYNOLDS,
Att'y for Plaintiff.

(Endorsed:) Filed 2d September, 1872. L. S. B. Sawyer, clerk.

40 *Supplemental answer of defendants.*

United States circuit court, district of California.

IRA G. FRENCH
vs.
THOMAS EDWARDS, L. M. LINCOLN, AND OTHERS.

The defendants in the above-entitled action, for a supplemental answer therein, allege:

That on the 23d day of October, A. D. 1865, a judgment was duly and regularly recovered in the district court of the sixth judicial district of the State of California, in and for the county of Sacramento, in favor of the people of said State, as plaintiff, and against one R. H. Vance and the land and premises described in the complaint in this action, and to recover which said action is brought, as defendants, for the sum of one hundred fifty-five and $\frac{49}{100}$ dollars damages and costs for delinquent taxes of said State and county, levied for the year 1864.

That a decree and order of sale were duly issued out of the clerk's office of said court upon said judgment, and directed to the sheriff of said county, and by him received on the 23d day of November, 1865, commanding said sheriff to sell so much of the real estate before mentioned as should be necessary to pay the said judgment.

41 That after the receipt of the said decree and order of sale, and before the day of the return thereof, the said sheriff did give legal notice of the time and place of such sale according to the statute in such case made and provided; and in pursuance of such notice said sheriff did, on the day of sale named therein, to wit, the 18th day of December, 1865, at the time and place therein mentioned, sell at public auction the said premises to this defendant, L. M. Lincoln, for the sum of one hundred and seventy-five dollars, the amount of said judgment and costs, that being the best bid therefor, and the said land so sold being the smallest quantity that any purchaser offered to take and pay such judgment and costs.

That afterwards and since the commencement of this action and the filing and service of the former answer of this defendant in this action, the said sheriff, James McClatchy, by virtue of the before-mentioned judgm't, decree, and order of sale, and of the statute in such case made and provided, and in pursuance of said sale and in consideration of the said sum of one hundred and seventy-five $\frac{42}{100}$ dollars, then and there paid by the said defendant Lincoln to said sheriff, said sheriff did, on the 11th day of June, 1872, by deed under his hand and seal, sell and convey to the said Lincoln the said premises, to recover which this action is brought.

And said defendants, further answering, refer to their several original answers on file in said action, and make the same a part of this, their supplemental answer, in the same manner as if said original answers were repeated herein.

42 Dated August 26th, 1872.

DELOS LAKE,
Defendants' Attorney.

(Endorsed:) Filed 11th September, 1872. L. S. B. Sawyer, clerk.

43 *Order am'd'g complaint.*

At a stated term of the circuit court of the United States of America of the ninth judicial circuit in and for the district of California, held at the court-room, in the city of San Francisco, on Friday, the 13th day of September, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Lorenzo Sawyer, judge.

IRA G. FRENCH
vs.
THOMAS EDWARDS ET AL.

On motion of plaintiff's attorney, it is ordered that the complaint herein be, and the same is hereby, amended by inserting therein the name W. T. Caruthers, instead of W'm Caruthers, J. T. Caruthers instead of T. Caruthers; also, the name of Antonio de Selva instead of Antone, and Samuel O. Ness instead of James Jackson.

I hereby certify that the foregoing is a full and true copy of an original order made and entered in the above-entitled action.

Attest my hand and the seal of said circuit court this 22nd
44 day of November, A. D. 1872.

L. S. B. SAWYER,
Clerk.

(Endorsed:) Filed 22nd November, 1872. L. S. B. Sawyer, clerk.

45 ***Finding.***

In the circuit court of the United States for the district of California.

IRA G. FRENCH, PLAINTIFF, *vs.* THOMAS EDWARDS ET AL. } Finding.

This action came on regularly for trial at the September term of this court in 1872, before this court, without a jury, a trial by jury having been waived by the written stipulation of the parties, according to the provisions of the statute.

The respective parties introduced their evidence and made their proofs, and after duly considering the same, and the argument of counsel thereon, the court finds from the evidence the following

FACTS.

First. Robert H. Vance was, on the 1st day of March, 1862, the owner and seized in fee of the premises in dispute and described in the complaint in this action. And said Vance on said 1st day of March, 1862, duly conveyed the same premises to the plaintiff by deed of conveyance, bearing date and duly acknowledged and recorded on said last-named day. And by the said last-named deed of conveyance the plaintiff became seized in fee of all said premises, and plaintiff remained so
46 seized and the owner in fee of said premises until the execution of the instrument in writing hereafter set out in these findings, made on the 9th day of January, 1863.

Second. On the 9th day of January, 1863, the plaintiff and the defendants Jefferson Lake, W. W. Crouse, Richard Sherburn, Leonard Hoyt, with others, executed under their hands and seals, and delivered an instrument in writing in the words and figures following, to wit:

"This indenture made the ninth (9) day of January, one thousand eight hundred and sixty-three, between Jefferson Lake, W. W. Crouse, Daniel E. Hastings, Richard Sherburne, William Kiesker, F. Windrich, Frank Davis, Leonard Hoyt, settlers on land hereinafter described, and Robert H. Vance, Ira G. French, and George L. Gibson, Sutter claimants of said land, parties of the first part, and Edward Martin, Frances E. Lynch, of the city and county of San Francisco, parties of the second part, witnesseth: That the said parties of the first part, for and in consideration of the sum of one dollar to each of them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, convey, and

confirm unto the said parties of the second part, and to their heirs and assigns forever, all and each of our right, title, and interest in and to the following tract or piece of land, situate, lying, and being in the county of Sacramento, State of California, and bounded and de-
47 scribed as follows, viz: commencing at a point on the Sacramento
River in a right line with the centre of Main street, in the town Sutterville, as the same is laid down on a map of said Sutterville, made by C. W. Coots, and dated July 1st, 1850, and filed in the office of the county recorder of Sacramento County on the 8th day of August, 1850, and running thence in an easterly direction along the center of said Main street to a point one mile from the place of beginning; thence at right angles northerly, one-half mile; and thence at right angles westerly, to the Sacramento River; and thence southerly along the Sacramento River to the place of beginning, together with all and singular the hereditaments and appurtenances thereunto belonging, or in any way or manner appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, rights, title, and interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the parties of the first part, in or to the above-described premises, and every part and parcel thereof, with the appurtenances, except the buildings thereon; to have and to hold all and singular the above mentioned and described premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns forever as joint tenants, upon trust, nevertheless, and to and for the uses, intents, and purposes hereinafter limited, described, and declared, that is to say, upon trust, to hold and convey the same in lots of such size and for such prices as shall be directed and designated by a committee of 4 persons, or a majority thereof, s'd committee to be selected as follows, to wit: two members thereof by the parties
48 hereto, of the first herein designated 'settlers,' one member
thereof by the parties hereto who are designated as 'Sutter claimants,' and one member thereof by the said roal company now being formed, and to be incorporated for the purpose of constructing, owning, and maintaining a railroad leading from said Sutterville, and connecting with the Sacramento Valley Railroad. The proceeds of sales are to be distributed and paid immediately upon the receipt thereof by the said parties of the second part, as follows: eight twenty-fourths thereof shall be paid to the said railroad company to be incorporated as aforesaid, when and so soon as the said railroad shall have been completed. Three twenty-fourths thereof to the said parties hereto, who are herein designated as 'settlers,' and who are in possession and entitled to the possession (under settlers' rules) of the several lots sold as aforesaid, and the remaining thirteen twenty-fourths thereof to the parties hereto, who are designated as 'Sutter claimants,' and who may hold the Sutter title to the several lots so sold as aforesaid; provided, however, if these shall be conflicting claims between said Sutter claimants to said moneys, the part of the moneys belonging to said claimants as aforesaid shall be held by the said party of the second until such conflicting claims shall have been settled and determined by arbitration, compromise, or legal proceedings, when the same shall be paid to such of the said Sut-
49 ter claimants as shall be thus determined to be the owner of the
Sutter title to the lot or lots about which such dispute or conflicting claims shall have been or arizen; or if any dispute shall arise between any of the said settlers as to the possession of the lots so sold, or any of them, then the three twenty-fourths of the said money arising from the lots, the possession of which shall be in dispute as aforesaid, shall be

held by said party of the second part until said dispute is determined as hereinbefore provided as to the Sutter claimants' disputes; and when such disputes are so settled, then the said money shall be paid to the person or persons so found and determined to be entitled thereto. And provided further, that when any lot or lots are sold in possession of which there are no settlers who are parties to this deed, sixteen twenty-fourths of the proceeds of such sales shall be paid to the Sutter claimants, and the other eighty twenty-fourths to the said railroad company. And provided further, that if the said parties to this deed who are herein designated as parties of the first *part and the railroad company* shall fail to select their four members of the said committee within five days after the commencement of the said railroad in good faith, or if such committee so selected as aforesaid shall fail to agree as to the directions to be given to the said parties of the second part as to the said sales, within thirty days after the commencement in
50 good faith of said railroad as aforesaid, then said parties of the
second part shall proceed to sell the said lands, at public auction, duly noticed and fairly conducted, for the best prices they can obtain for the same, in such sized lots and in such locations as they shall deem for the best interest of all the parties interested, provided that they shall not sell more than one-twentieth part of said lands at any one sale, nor make *make* more than one sale in a month. And provided further, that no conveyances shall be made by the said party of the second part until the said railroad shall have been commenced in good faith as aforesaid, and this conveyance shall be void if such railroad shall not be built within one year from the date of these presents; provided, however, that if the iron for said railroad shall be lost or detained on its transit from the Atlantic States by any accident, then the time for completing said railroad shall be extended to two years, instead of one year. Provided further, that the said railroad company at any time, after the commencement in good faith to build said railroad, may select a block of land as the same are laid out in said map of the town of Sutterville for the use of said railroad company, which block so selected shall be conveyed to said railroad company, paying therefor the sum of two thousand dollars. Provided, however, that if any portion of said
51 lands shall have been sold and conveyed by the said parties of
the second part before the completion of the said railroad, the title to such part so sold shall not be affected by the failure to complete said railroad as aforesaid, but the portion of the purchase-price of said parts of the land sold which is hereinbefore provided to be paid to the said railroad company shall be paid, one-half to said settlers and the other half to the said Sutter claimants, if the said railroad is not completed within two years as aforesaid. Provided further, that all sales and conveyances herein provided to be made, and all and every act and thing whatsoever herein provided to be done by the said parties of the second part, shall and may be done by the said Edward Martin, unless he shall die or remove from the said State, or be unable to act, in which case alone the said Francis E. Lynch shall perform all the acts and exercise all the powers herein provided to be done and exercized by the said parties of the second part.

*The words "part and the railroad company" were interlined in the original deed in pencil-mark.

JARED IRWIN,
County Clerk and ex-officio County Recorder.
By W'M T. HIGGINS,
Deputy.

"In witness whereof we have hereunto set our hands and seals the day and year first above written.

"In presence of—

"George A. King.

"JEFFERSON LAKE. [SEAL.]
"W. W. CROUSE. [SEAL.]
"RICHARD SHERBURN. [SEAL.]
"D. E. HASTINGS. [SEAL.]
"LEONARD HOYT. [SEAL.]
52 "WILLIAM KERSKER. [SEAL.]
his
"FRANK + DAVIS. [SEAL.]
mark.
"F. WINDRICH. [SEAL.]
"ROB'T H. VANCE. [SEAL.]
"IRA G. FRENCH,
"By JOHN REYNOLDS,
"*His Attorney in Fact.* [SEAL.]
"GEORGE L. GIBSON, [SEAL.]
"By JOHN REYNOLDS,
"*His Attorney in Fact.*

"State of California,
"*County of Sacramento, ss:*

"On this eighteenth day of February, 1863, before me, Prescott Robinson, a notary public in and for said county, personally appeared George E. King, personally known to me to be the same person whose name is subscribed to the annexed instrument as a witness thereto, who, being by me duly sworn, deposed and said that he resides in Sacramento County; that he was present and saw Jefferson Lake, Richard Sherburn, D. E. Hastings, Leonard Hoyt, William Keisker, Frank Davis, and F. Windrick, known to him to be the same persons, and F. Windrick acknowledged in the presence of deponent that they executed the same freely and voluntarily and for the uses and purposes therein mentioned, and that he, the deponent, thereupon signed his name as a subscribing witness thereto. In witness whereof I have hereunto set my hand and affixed my seal of office the day and year first above written.

53 [SEAL.] "PRESCOTT ROBINSON,
"*Notary Public.*

"State of California,
"*County of Sacramento, ss:*

"On this eighteenth day of February, A. D. one thousand eight hundred and sixty-three, before me, Prescott Robinson, a notary public in and for said county, duly commissioned and sworn, personally appeared the within W. W. Crouse and Robert H. Vance, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the individuals described in and who executed the said annexed instrument, and acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned. In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL.] "PRESCOTT ROBINSON,
"*Notary Public.*

"STATE OF CALIFORNIA,
" *City and County of Sacramento, ss:*

"On this twenty-fourth day of February, A. D. one thousand
54 eight hundred and sixty-three, before me, Albert G. Randall, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared John Reynolds, personally known to me to be the same person described in and who executed *the* power of attorney the annexed instrument as the attorney in fact of Ira G. French, named in the annexed instrument as a party thereto, and therein described as the party executing the same by his said attorney, and the said John Reynolds acknowledged to me that he executed the same freely and voluntarily, as and for the act and deed of the said Ira G. French, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year last above written.

[SEAL.] "A. G. RANDALL,
" *Notary Public.*

"STATE OF CALIFORNIA,
" *City and County of San Francisco, ss:*

"On this twenty-fourth day of February, A. D. one thousand eight hundred and sixty-three, before me, Albert G. Randall, a notary public in and for said city and county residing therein, duly commissioned & sworn, personally appeared John Reynolds, personally known to
55 me to be the same person described in and who executed by power of attorney the annexed instrument, as the attorney in fact of George L. Gibson, named in the annexed instrument as a party thereto and therein described as the party executing the same by his said attorney, and the said John Reynolds acknowledged to me that he executed the same freely and voluntarily as and for the act and deed of the said George L. Gibson, and for the uses and purposes therein mentioned. In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in the city and county of San Francisco, the day and year last above written.

[SEAL.] "A. G. RANDALL,
" *Notary Public.*

"Recorded, February 28th, 1863, at 12 h. 30 m. p. m., at request of R. H. Vance."

56 Third. The railroad company mentioned in said deed to Martin and Lynch was never incorporated, nor was said railroad ever commenced.

Fourth. The defendants who have appeared and answered in this action were in the exclusive adverse possession of the premises described in the complaint at and before the commencement of this action, holding the same adversely to the plaintiff and all other persons.

Fifth. On the trial of this action the plaintiff waived his claim for damages without prejudice.

Sixth. The value of the land in dispute is $20,000.

From the foregoing facts the court finds the following

CONCLUSION OF LAW.

First. The plaintiff acquired title in fee to all the premises described in the complaint by the deed from Robert H. Vance to him on the 1st day of March, 1862.

57 Second. That the legal title of the plaintiff was conveyed by the said deed to Martin and Lynch on the 9th day of January, 1863, and did not revest on failure of the conditions mentioned in said deed without a re-entry for condition broken or other act manifesting an intention to avoid the deed on that ground, and that the legal title to said premises remained and was vested in said trustees at the commencement of this action.

Fourth. That the defendants are entitled to judgment in their favor with costs.

And it is ordered that a judgment be entered accordingly.

LORENZO SAWYER,
Circuit Judge.

58 *Judgment of October 30th*, 1872.

In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

Ira G. French
v.
Thomas Edwards et al. } No. 235.

This cause having come on regularly for trial on the 13th day of September, A. D. 1872, being a day in the June term, 1872, of said court, before the court, sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties, duly filed with the clerk of said court. S. O. Houghton and John Reynolds, esq'rs, appearing on behalf of plaintiff, and Delos Lake and J. H. McCune, esq'rs, on behalf of defendants, and the trial having been proceeded with upon the 17th and 18th of said September, and witnesses on behalf of plaintiff and of defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and after due deliberation, the court having filed its finding in writing and ordered that judgment be entered in accordance therewith:

Now, therefore, by virtue of the law and of the finding aforesaid, it
is considered by the court that the plaintiff take nothing by this
59 action, that the defendants go hereof without day, and that the
defendants do have and recover of and from Ira G. French,
plaintiff, their costs in this behalf expended, taxed at three hundred and
ninety-five $\frac{35}{100}$ dollars.

Judgment entered the 30th day of October, 1872.

L. S. B. SAWYER, *Clerk.*

A true copy of an original, entered in the therein entitled cause, i judgment register C. L. N. 1, p. 452.

Attest, &c.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 30th October, 1872. L. S. B. Sawyer, clerk.

60 **Bill of exceptions.**

In the U. S. circuit court of the district of California, ninth judicial circuit.

IRA G. FRENCH, PLAINTIFF,
THOMAS EDWARDS ET AL., DEFENDANTS. } Bill of exceptions.

Be it remembered that at the June term, 1872, of the said court, holden in and for the district of California, at the city and county of San Francisco, on the 13th, 17th, and 18th days of September, 1872, the action above entitled came on to be and was tried before the court, the honorable Lorenzo Sawyer presiding. The parties, by stipulation in writing, having waived a jury, the said action was tried before said court without a jury. The said plaintiff, to maintain the issues on his part, proved title in fee to the premises in dispute as found by the court.

And also proved that the defendants who have answered in this action were in possession of said premises at the commencement of this action.

61 The said defendant, for the purpose of proving title out of the plaintiff, at the commencement of this action offered in evidence the deed made by the plaintiff and others to Edward Martin and F. E. Lynch, a copy of which is set out in the findings filed herein, the execution of which appears by the acknowledgments thereto.

The said plaintiff then and there objected to the reading in evidence the said deed, on the ground that the same was irre*val*ent and incompetent.

The court overruled the said objections and admitted the deed in evidence, and the plaintiff then and there duly excepted.

In testimony whereof, and of the truth of the foregoing bill of exceptions, I, the said judge before whom said cause was tried, have hereunto set my hand and seal this 23d day of November, A. D. 1872.

LORENZO SAWYER, [SEAL.]
United States Circuit Judge of the Ninth Judicial Circuit.

(Endorsed:) Filed November 23d, A. D. 1872. L. S. B. Sawyer, clerk. By J. F. O'Beirne, dep. cl'k.

62 *Bond on writ of error.*

Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,
vs.
THOMAS EDWARDS, W. T. CAROTHERS, J. F. Carothers, Samuel Onesti, Antonio de Silva, David Morell, Samuel O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. W. Lincoln, Andrew Carothers, and R. Sherburn, defendants in error.

Know all men by these presents that we, John Reynolds and George Barstow, are held and firmly bound unto the above-named defendants in error in the sum of three hundred dollars, to be paid to the said defendants in error, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated the 30th day of November, A. D. 1872.

Whereas the above-named Ira G. French hath prosecuted a writ of error to the Supreme Court of the United States to reverse the 63 judgment rendered in the above-entitled suit by the circuit court of the United States for the ninth circuit, district of California:

Now, therefore, the condition of this obligation is such that if the above named Ira G. French shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall void; otherwise the same shall be and remain in full force and virtue.

JOHN REYNOLDS. [SEAL.]
GEORGE BARSTOW. [SEAL.]

Delivered in presence of JA'S F. O. BEIRNE.

I approve the amount and form and the sufficiency of the sureties on the within and foregoing bond.

OGDEN HOFFMAN,
U. S. Dist. Judge for the District of California.

UNITED STATES OF AMERICA,
District of California, *ss:*

John Reynolds and George Barstow, being duly sworn, each for himself, deposes and says that he is worth the amount of three hundred dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN REYNOLDS.
GEORGE BARSTOW.

Subscribed and sworn to before me this 30th November, A. D. 1872.

JA'S F. O. BEIRNE,
U. S. Com'r, Dist. of California.

64 (Endorsed:) Filed November 30th, 1872. L. S. B. Sawyer, clerk. By J. F. O. Beirne, dep. clerk.

65 UNITED STATES OF AMERICA,
District of California, *ss:*

I, Lorenzo S. B. Sawyer, clerk of the United States circuit court for the district of California, in the ninth judicial circuit, do hereby certify that the foregoing sixty-three written pages, numbered from 1 to 63, both inclusive, are a true copy of the record, (except the plea in abatement, the answer thereto, and the decision of the court thereon; and the verdict and judgment entered at the former trial of this cause, which said judgment was reversed on a former writ of error; and the bill of exceptions made at such former trial,) and of all the proceedings in the cause therein entitled; and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 12th day of December, A. D. 1872.

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsement on cover:) No. 387. Ira G. French, plaintiff in error, vs. Thomas Edwards, W. T. Carothers, J. T. Carothers, Samuel Onesti, Antonio de Silva, David Moree, Sam'l O. Ness, Leonard Hoyt, Jefferson Lake, W. W. Crouse, L. W. Lincoln, Andrew Carothers, & R. Sherburn. California c. c. U. S.—Filed 27th December, 1872.

o

No. ....

IN THE SUPREME COURT

OF THE UNITED STATES.

FRENCH,

Plaintiff in Error,

vs.

EDWARDS et Al.

Defendants in Error.

Points and Authories of Plaintiff in Error.

JOHN REYNOLDS. . Of Counsel for Plaintiff.

John J. Conmy, Printer, San Jose.

In Supreme Court of the United States.

FRENCH,
Plaintiff in Error,
vs.
EDWARDS ET AL.,
Defendants in Error.

Points and Authorities of Plaintiff in Error.

This is an action of ejectment to recover 320 acres of land in Sacramento county, State of California, of the value of $20,000 (fol. 56), commenced November 8th. 1866, and is the same case, and the pleadings are the same—except a supplemental answer (fol. 40)—as in the case of French vs. Edwards, reported in 13 Wallace, p. 506. On being remanded from this Court to the Circuit Court for a new trial, the cause was tried before that Court without jury (a jury having been waived, fol. 39), and comes here upon the findings of fact (fol. 45 to 48), and a bill of exceptions found at fol. 60.

The plaintiff and principal defendants in this case, as parties of the first part, on January 9th, 1863, made a deed to two trustees, as parties of the second part, "upon trust to hold and convey the same in lots" under the direction of a committee to be chosen by the grantors named in the deed, and a railroad company then about to be formed and incorporated; the proceeds of the sales to be divided in certain designated proportions between the parties to the deed and the railroad company (fols. 47–49).

It is by said deed also provided that no conveyances by said parties of the second part shall be made until the said railroad shall have been commenced in good faith, and this conveyance *shall be void* if such railroad shall not be built within two years (fol. 50).

The railroad company was never incorporated, nor was the railroad ever commenced (fol. 56).

The defendants who had appeared and answered, (including those who were parties to the trust deed) were, at and before the commencement of this action, in the exclusive *adverse* possession of the premises, holding the same adversely to the plaintiff and *all other persons*, which of course includes the trustees, Martin and Lynch (fol. 56).

The plaintiff at the date of the trust deed, and at the commencement of this action, was the owner in fee and entitled to the possession, unless that title and right of possession were in the trustees (fols 45–6 and 57).

From these facts the learned Circuit Judge decided that the legal title of the plaintiff was conveyed by the deed to Martin and Lynch, and did not revest on failure of the conditions, without a re-entry for condition broken, or *other act manifesting an intention to avoid* the deed on that ground; and that the legal title so conveyed remained vested in the trustees at the commencement of this action (fol. 57).

And the only question presented for review, by this Writ of Error, is whether this action can be maintained by the plaintiff, without a re-entry by him, before suit brought.

I.

No re-entry was necessary to revest the estate granted to the trustees, upon the failure to build the railroad within two years—especially as no company for that purpose had been incorporated.

Police Jury vs. Reeve, 6 *Martin*, 221 (*N. S*).
Heyden vs. Stockton, 5 *Pick.* 528.

(*a*) The re-entry, or assertion of a determination to insist upon the forfeiture for nonperformance of a condition subsequent, presupposes an ability to perform, and the power to waive the performance of the condition. And it necessarily has to be made to or upon the person who is to perform. But in this case the party who was to perform the condition had not come into existence at the time limited for performance.

(*b*) The trustees had no power, either alone or in conjunction with the plaintiff, to waive the forfeiture or affirm or avoid the deed. The exercise of any power over the title by the trustees, depended upon the consent and acts of a corporation that never came into existence.

(*c*) The actual possession, as shown by the trust deed, was held by the parties thereto who were designated as "settlers." And the plaintiff, though having the right of entry, could not surrender to the trustees the actual possession, and so he could not re-enter, for condition broken. Actual entry relates to the possession and not to the right. *See answers of Lake, Crouse, Sherborn and Hoyt, at fols.* 25, 29, 32 and 36.

(*d*) No re-entry could be made by the plaintiff, unless made upon the defendants themselves (fol. 56).

And none could be made upon them, for the re-entry is to defeat the livery made on the creation of the original estate, and certainly no livery of seizin was made to defendants.

4 *Kent's Com.* 127.

II.

Re-entry for breach of any condition subsequent is not required in this State. The re-entry was only required to defeat the livery made on the creation of the estate; and when no livery of seizin is made, no re-entry can be necessary to defeat it. (4 *Kent*, 127.)

By the Statutes of California, land may be conveyed though in adverse possession of another.

Statutes of 1850, *p.* 252, § 34.

In this case the record shows that the possession never was delivered to the trustees. And no livery having been given, no re-entry could be made to defeat it. These defendants held the possession, then as now, in hostility to the plaintiff, and that adverse claim and possession was not surrendered by this deed of trust.

III.

If possession had been surrendered to the trustees when the deed was made to them, the only parties who could have re-entered for breach of condition subsequent, would have been the defendants (the settlers), the actual possession coming from them.

(*a*) If a constructive re-entry was necessary (and could be made) to avoid the deed, then that re-entry was made by the only parties to the deed who could make it—the defendants who were in the actual possession, and by whom alone the actual seizin could have been ~~actively~~ actually or constructively given. And when any party who has the right to re-enter for condition broken, does so, the forfeiture is completely asserted and the deed becomes void, and each party to it is necessarily remitted to his former estate.

IV.

The trustees Martin and Lynch, at most, took only the naked legal title, without any beneficial interest whatever in the land. And therefore, on failure of the only condition upon which the estate could be continued, and upon failure of which the trust was to determine, the statute of uses executed the trust in favor of the party entitled to the use.

The findings in this case show that the plaintiff was entitled to the whole use of the land on the termination of this trust estate.

Doe ex dem Poor vs Considine 6 Wall 470 & 471

V.

It is respectfully submitted that the Circuit Court should be directed to enter judgment for the plaintiff, upon the facts found.

Act to further the Administration of Justice, June 1, 1872, *sec.* 2.

JOHN REYNOLDS,
Of Counsel for Plaintiff.

Whe

In the Supreme Court of the United States.

IRA G. FRENCH, PLAINTIFF IN ERROR,

vs.

THOMAS EDWARDS ET AL., DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

This case was tried in the circuit court, and brief for plaintiff in error was filed in this court, upon the theory that the *proviso* relied upon by plaintiff to defeat the deed of trust set out in the record, was a condition subsequent Whether or ~~which~~ defeated the deed upon the failure to perform the condition without entry or claim by the grantors. was the question discussed

It is now at the hearing in this court claimed that the deed is not on condition, but constitutes a trust, which, when condition is broken puts the legal title in the grantors without claim.

Is the deed in question made upon a condition subsequent to be defeated, only upon entry or claim by grantors, after condition broken?

This question should be answered in the affirmative.

(*a*.) The plaintiff and some of defendants unite as grantors. They grant, bargain, sell and convey to two trustees chosen by them upon a nominal consideration. They grant the possession of the *locus in quo*, as well as the right of possession to hold *forever* as joint tenants.

(*b*.) The trustees are to hold and convey in lots as directed by a committee appointed by the grantors, or if they fail to appoint such committee, then they are to sell upon their own volition with certain restrictions. These sales may be made after the commencement and before the completion of the road.

(*c.*) The proceeds of the sale to be distributed to grantors and a railroad company not then formed, but in process of formation.

(*d.*) The deed to be void if the railroad be not built in one year.

This deed, when delivered, gave the grantors and a railroad company, yet to be formed, the whole beneficial estate, or put the legal estate in the trustees' proviso; that the deed should be void, if, &c. Under these circumstances, the deed was on condition subsequent, and the title could not, by operation of law, revest in the grantor without entry or claim.

1st. A condition subsequent is a quality annexed by him that hath the estate in the land, whereby an estate may be defeated on an uncertain event. Washburn on Real Property, Vol. 1, p. 467; Shepherd's Touchstone, Ch. VI, p. 117.

"For the most part conditions have conditional words in their frontispiece and do begin therewith, and that amongst these words there are these words that are most proper, which, in and of their own nature and efficacy, without any addition of other words of reentry in the conclusion of the conditions, do make the estate conditional; as *proviso*, *ita quod*, and *subconditione*." Shepherd's Touchstone, p. 121; 1st Washburn, on Real Property, p. 467.

The words relied on to defeat the deed in question, are introduced under proviso, and the force of that word constitutes a condition.

2d. The deed in question imports that the title vested in the trustees, as they were to have the possession and deal with the estate before the end of the year, and their sales were to be good, not to be defeated by the condition, if broken.

3d. But it is said by plaintiff, point V, only a base or qualified fee vested in the trustee.

Base fee is a tenure in fee at the will of the lord. Tomlin's Law Dictionary. Base fee.

Coke says a base fee or qualified fee is what may be defeated by limitation *or on entry*, thus, in that kind of estate, recognizing the rule invoked by defendants (see same definition). Neither was the trust a dry one. The grantors gave the trustees immediately full power over the estate, even to the taking of possession, and nothing could defeat the estate so granted, except the non-performance of the condition.

4th. It is a general rule that where a man hath a thing, he may condition with it as he will. Shepherd's Touchstone, p. 118.

The condition itself must be made by and reserved to him that hath the estate, but the condition may be reserved to be performed by a stranger. Shepherd's Touchstone 120, 126, 127, 129, 135, 143.

In this case it does not appear who were the incorporators of the company to be formed, perhaps the grantors, or the grantors and strangers. The condition put in the instrument was, that it should be void if the railroad should not be built. The parties, by their deed, assumed a *certain* status. Let us suppose that the railroad company had, at the expiration of the year, nearly completed its road, and the grantors in the deed, (including plaintiff) desired to waive the condition, would it become necessary for the parties to make a new deed? Yet, if the non-performance of the condition without entry or claim on the part of the grantors absolutely divested the trustees of the estate, this would be the resnlt.

6th. The cases cited by counsel in his sixth point are so different from this, that they can hardly be cited in illustration.

Doe vs. Considine arose under a will, and the question was, what disposition did the testator make of his estate? And this court held that the trustees took, by its terms, a legal estate during the lives of J. M. Barr and wife, and at the death of the survivor the estate, by force of the will, vested in the residuary legatee.

In this case the grantor provided that the deed should be void if. &c. This enabled him to retain his estate by entry, or claim, or he might waive the forfeiture and proceed by such other remedy as he might take. But until he did make his claim, the title remained where he had placed it.

But counsel claim that if the court shall reverse the decision of the Circuit Court, it shall order final judgment in the case.

This can only be done in furtherance of justice, *and where all the facts are before the court.*

Atherton v. Fowler, 46 Cal., 320. The judgment being for defendants, they were unable to bring up their case by bill of exceptions.

The act of Congress of June 1, 1872, sec. 2, is an affirmance of a power residing in all courts of last resort. It must be done only in furtherance of justice, and before that can be determined the facts must appear.

The judgment should be affirmed.

DELOS LAKE,
J. H. McKUNE,
Attorneys for defendants in Error.

Supreme Court of the United States.

FRENCH,
plaintiff in error,
v.
EDWARDS, ET AL.
defendants in error.

PLAINTIFF'S BRIEF IN REPLY.

I.

The deed, a copy of which is set out in the findings, is not a conveyance upon condition subsequent.

"Subsequent conditions are those which operate upon estates already created and vested, and render them liable to be defeated."

4 Kent Com., 125.

A conveyance upon condition subsequent is one, whereby an estate is vested in the grantee, which may be enlarged or defeated.

It may be enlarged by performance of the condition, or by a waiver thereof, and it may be defeated by a failure to perform the condition.

1 Black Com. 154.

II.

In construing that clause in the deed which provides that it shall be void if the projected railroad be not completed in two years, every part of the deed must be looked into.

Goodyear v. Cary, 4 Blatch. C. C. R., 271.

III.

The deed should be construed so as to give it the effect intended by the parties, and the intention must be ascertained from the language employed to express it.

Thomas v. Hatch, 3 Sum. C. C. R., 170.

IV.

The clause which provides that the deed shall be void if the railroad be not completed within two years, is not a condition; but a limitation. It fixes the time beyond which the trust is not to continue.

"When an estate is so expressly confined by the words of its creation, that it cannot endure for any longer time than till the contingency happens, upon which the estate is to fail, this is denominated a limitation.

1 Black Com., 155.

V.

The conveyance vested in the trustees a base or qualified fee. It created a mere passive dry trust, which was only to become active, upon the happening of the event which was to render it so, within the time limited therefor. If the event happened, the trust was to be executed according to the terms of the deed, otherwise the trust was to cease, and the title revert to the grantors.

VI.

No conveyance was necessary to revest the title in the grantors, for although the conveyance is to the trustees and their heirs, they took under the deed that quantity of interest only which the purposes of the trust required, and as the railroad was not completed within the time limited therefor, the legal estate did not continue in the trustees beyond the period of two years.

Doe, Lessee of Poor v. Considine, 6 Wal., 471.

Doe, Lessee of Player v. Nichols, 1 Barn. and Cress., 336.

Doe, Lessee of Shelly v. Edlin, 4 Adol. and Ellis, 589.

VII.

If this court reverses the judgment of the Circuit Court, it may order that court to enter such judgment as the facts justify.

Act to further the administration of justice, 17 Stat. at Large, 196.

McMillan v. Richard, 9 Cal., 421.

Atherton v. Fowler, 46 Cal., 320.

S. O. HOUGHTON,
For Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IRA G. FRENCH,
Plaintiff in Error,

vs.

THOMAS EDWARDS et al,
Defendants in Error.

Brief for Defendants in Error.

DELOS LAKE,
Of Counsel for Defendant in Error.

SAN FRANCISCO:
H. S. CROCKER & CO. PRINTERS.
1874.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

IRA G. FRENCH,
Plaintiff in Error,
v.
THOMAS EDWARDS ET AL,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

Ejectment for land situate in the County of Sacramento.

Complaint filed in the Circuit Court for the Northern District of California, November 8, 1866 (*folio 3*).

The defendants pleaded severally in substance the general issue.

The cause was tried by the Court without a jury, and there was a finding and judgment for defendants, October 30, 1872 (*folio 59*).

Plaintiff removed the case to this Court by Writ of Error.

The Record discloses that the plaintiff, by a bargain and sale deed, dated on the 9th day of January, A. D. 1863, conveyed the "*locus in quo*" to Edward Martin and Francis E. Lynch, upon condition as specified and set forth in said deed, that the conveyance should be void if a certain railroad mentioned in the conveyance should not be constructed within a certain named period of time. (*Vide Transcript, folios 46 to 57 and 61.*)

I.

The deed to Martin and Lynch conveyed an estate "in presenti." The condition of the deed is a "condition subsequent," for a breach of which the grantors have a right of re-entry, but until re-entry or equivalent acts, the estate remains in the grantee. To divest the estate it was necessary for the grantors or their representatives to re-enter upon the land for a breach of the condition, or by other acts or words assert, in an unmistakable manner, that possession was claimed for condition broken. Thereby showing an intention to take advantage of the breach of condition.

Vide Nicoll v. *N. Y. & E. R. R. Co., 12 N. Y. Court of Appeals, pp. 121–130.*

(Affirming same case: *12 Barbour, N. Y. Sup. Court, p. 460.*)

Fonda v. *Sage. 46 Barbour, p. 110–123.*

Chalker v. *Chalker, 1 Conn. p. 79.*

Grey v. *Blanchard, 8th Pick, p. 283.*

Willard v. *Henry, 2 N. Hamp. p. 120.*

Bowen v. *Bowen, 18 Conn. p. 538.*

Sperry v. *Sperry, 8 N. Hamp. p. 477.*

Tullman v. *Snow, 35 Me. p. 342.*

Greenleaf's Cruise on Real Property, vol. 1, M. P. 32.

The case is not altered by a provision in the deed, that the same shall be void in case of non-performance of the condition.

Chalker v. *Chalker, Supra.*

There being no evidence of a re-entry for condition broken, nor any act tantamount, the title has not reverted, but remains in the grantees named in the above conveyance.

II.

In any event the Bill of Exceptions shows no error. (*Record, folio 61.*)

The conveyance was competent and material evidence, and was properly admitted to show title out of the plaintiff. It was for the plaintiff then to show, if he could, that the title re-vested in him by reason of a breach of the condition in the deed.

The question as to the effect of a breach of the condition can therefore only be raised, if at all, on the finding of fact of the Judge, (*Record*, *folio 56*), that the railroad was not constructed within the time limited.

The judgment of the Circuit Court should therefore be affirmed.

DELOS LAKE,
Of Counsel for Defendant in Error.

ADDENDA.

III.

In answer to the extraordinary request of the Counsel for the plaintiff in error, that this Court should direct the Court below to enter judgment for the plaintiff, it is only necessary to suggest that this is a common law action, and that the whole case is not before the court. The Judge only found such facts as were necessary to present the point as to the effect of a breach of the condition subsequent in the deed.

Of course, if the judgment is reversed, there must be a new trial.